STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

JOHN OLIVER WOOTEN **No. 149917**
Defendant-Appellant.

L.C. No. 11-012794–01-FC
COA No. 314315

APPELLEE'S SUPPLEMENTAL ANSWER TO THE APPLICATION FOR LEAVE TO APPEAL, PURSUANT TO THE ORDER OF JUNE 3, 2015

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Table of Contents

Table of Authorities

Federal Cases **Page**

State Cases

Other

Statement of the Questions

The Court has directed that the parties address the following questions:

1. **whether the prosecution is permitted, during its case-in-chief, to elicit testimony from a police witness regarding the defendant's pre-arrest silence or failure to come forward to explain a claim of self-defense, see, e.g., Combs v Coyle, 205 F3d 269 (CA 6, 2000); Hall v Vasbinder, 563 F3d 222 (CA 6, 2009)?**

   The People answer: Yes

2. **whether such evidence is admissible as substantive evidence of the defendant's guilt, or as impeachment of the defendant's anticipated defense theory?**

   The People answer: It is admissible for either or both, where relevant

3. **if such evidence is inadmissible, whether the trial court clearly erred in finding that the trial prosecutor did not intentionally goad the defense into moving for a mistrial, and whether the trial court erred in granting a mistrial, but allowing the defendant to be retried?**

   The People answer: No

Statement of Facts

The People accept defendant's facts with the addition of those facts stated in the argument, and with the exception of any argumentative statements.

Argument

I.
The use of prearrest silence of the defendant by the prosecutor as substantive evidence does not violate the Fifth Amendment, and the prosecutor did not "goad" the defense into requesting a mistrial by asking a proper question.

"No person . . . shall be compelled in any criminal case to be a witness against himself."[1]

"...the Fifth Amendment actually means what it says."[2]

Introduction

A. The questions this Court has directed be addressed, and the People's answers

The Court has directed that the parties file supplemental briefs addressing:

1. whether the prosecution is permitted, during its case-in-chief, to elicit testimony from a police witness regarding the defendant's pre-arrest silence or failure to come forward to explain a claim of self-defense, see, e.g., Combs v Coyle, 205 F3d 269 (CA 6, 2000); Hall v Vasbinder, 563 F3d 222 (CA 6, 2009);

2. whether such evidence is admissible as substantive evidence of the defendant's guilt, or as impeachment of the defendant's anticipated defense theory; and

3. if such evidence is inadmissible, whether the trial court clearly erred in finding that the trial prosecutor did not intentionally goad the defense into moving for a mistrial, and whether the trial court erred in granting a mistrial, but allowing the defendant to be retried.

The People answer that:

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[1] Fifth Amendment, United States Constitution.

[2] Joseph Grano, *Confessions, Truth, and the Law* (University of Michigan Press: 1993), p.143.

1. under the United States Supreme Court decision in *Salinas v. Texas*[3]—and precedent from this Court—the prosecution is permitted—that is, the Constitution so permits—during its case-in-chief, to elicit testimony from a police witness regarding the defendant's pre-arrest silence or failure to come forward to explain a claim of self-defense; note that the Sixth Circuit has recognized that *Combs v Coyle,*[4] referenced in this Court's order, has been abrogated by *Salinas*, see *Abby v. Howe*;[5]

2. that silence is admissible as substantive evidence—that is, the Constitution so permits—of the defendant's guilt, *and* as impeachment of the defendant's anticipated defense theory;

3. if that silence is constitutionally inadmissible, there is no basis on which to find that the trial court clearly erred in finding that the trial prosecutor did not intentionally goad the defense into moving for a mistrial, so as to allow the defendant to be retried, defendant having consented to the mistrial by moving for it.

B. The factual background of the claim

In the early morning hours of July 5, 2011, around 2 a.m., officer Jeffrey Bare received a police run regarding a shooting at the Pretty Woman bar, and arrived at the bar five to seven minutes later.[6] Alfonso Thomas had been shot, fatally, as it turned out, and had already been conveyed to the hospital when Officer Bare and his partner arrived, but a wounded man, Omar Madison, was lying on the floor inside the bar.[7]

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[3] *Salinas v. Texas*, ——U.S. ——, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013)

[4] *Combs v Coyle*, 205 F.3d 269 (CA 6, 2000).

[5] *Abby v. Howe*, 742 F.3d 221, 228 (CA 6, 2014). This decision will be discussed in detail subsequently.

[6] T 7-25, 15-16.

[7] T 7-25, 16.

Madison was working at the bar as manager, and the deceased, Alphonso Thomas, was working there as a valet when the homicide occurred. Thomas was not the "bouncer," did not carry a gun, and in Madison's opinion, was a peaceful person.[8] Defendant patronized the bar and was known to Madison as "slick."[9] When defendant and another man known as "C" tried to enter the bar, the bar's security man tried to search them, something that was standard procedure to keep guns out of the bar.[10] Defendant and "C" resisted the search, and so Madison went over to assist, and in so doing felt a gun in defendant's waistband. Madison told them they could not come in the bar with the gun, and defendant became irate.[11] Defendant reached for the gun, and Madison pushed him outside the door; C then jumped on Madison, and the doorman, Anthony Gary, came to his aid. Another customer, "G," came up, and encouraged Madison to let defendant go, saying "I got him, I got him." Thomas [the deceased] then took Gary's gun from Gary's back [apparently in the back of his waistband]; Madison would not have let go unless the situation was "secured" in this fashion.[12] Madison let the defendant go, and he and Thomas turned to go back in the bar, when Madison heard shots. He was struck in the left buttock, and he saw defendant shooting the deceased.[13] No one but defendant fired a gun.[14] Anthony Gary

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[8] T 7-25, 62-64.

[9] T 7-25, 64.

[10] T 7-25, 66.

[11] T 7-25, 66-67.

[12] T 7-25, 66-70.

[13] T 7-25, 70-71.

[14] T 7-25, 73.

did not fire a gun,[15] and Madison did not pick up the gun which Thomas had taken from Gary's back, had no access to it later, and thus could not have submitted it to the police for testing.[16]

Anthony Gary, the "doorman," said that he when he was coming back to the bar after walking a woman to her car, he saw Madison and the defendant having words and in a tussle. C came out of the bar and grabbed Madison, and Gary grabbed C. Gary was carrying a .380 caliber pistol in a holster; the holster found in the parking lot was his.[17] While this was occurring, Thomas took Gary's gun. Gary never saw any guns, and then shooting started, and defendant "just went crazy." He saw defendant shooting at Thomas.[18] The gun was a long, silver revolver.[19] He retrieved his gun after all the shooting, and it had not been fired;[20] his gun ejected casings when fired.[21] On cross-examination, defense counsel asked "And *had you seen a casing that had been fired from your gun you would have collected that too because, again, you don't want your gun to be a part of that situation*?" and also "you understand that when you fire that weapon it hits that casing and it leaves an imprint on that casing. You understand that, don't you? . . . . And that casing, if found, can be traced back to your weapon. You understand that too, don't you?"[22]

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[15] T 7-25, 115.

[16] T 7-25, 115-117.

[17] T 7-26, 37.

[18] T 7-26, 39.

[19] T 7-26, 40.

[20] T 7-26, 42.

[21] T 7-26, 60-61.

[22] T 7-26, 62-63 (emphasis supplied).

During his three to four hour stay at the crime scene, Officer Bare never saw the defendant, who had left.[23] There was what appeared to Officer Bare to be blood on the ground outside the door of the bar. The blood was not dry, but pooled.[24] No shell casings were found, and none are ejected from a revolver, while casings *are* ejected from a semi-automatic weapon.[25] The injured Omar Madison was taken to the hospital.[26]

Officer Raymond Diaz also responded to the bar to "process" the scene.[27] He searched for shell casings, and found none, but discovered a holster in the parking lot, one that was designed for a semi-automatic weapon.[28] Officer Diaz concluded from the lack of casings that no semi-automatic weapon had been fired.[29] Officer Diaz did not see defendant at the scene during his time there.[30] He found three spent bullets, and they were larger than a .22 caliber.[31]

Shortly after the killing, Officer LaTonya Brooks obtained an arrest warrant for the charge of murder for defendant. Extensive efforts were made to find defendant to arrest him, but they were unsuccessful, until defendant was apprehended on December 3rd, almost four months

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[23] T 7-25, 16.

[24] T 7-25, 17-18.

[25] T 7-25, 19.

[26] T 7-25, 20.

[27] T 7-25, 26.

[28] T 7-25, 31-32.

[29] T 7-25, 36.

[30] T 7-25, 43.

[31] T 7-25, 49.

from the murder.[32] When the prosecuting attorney asked if officer Brooks had become aware of any reputation the deceased might have had for peacefulness, a rather bizarre exchange took place, with the trial judge saying that because the deceased in a murder case is the "complaining witness," though obviously the murder victim will not be testifying, the murder victim is nonetheless a "witness" for purposes of MCR 6.201.[33]

The victim had no record of any crimes of violence, and the prosecutor was allowed to complete his questioning regarding reputation of the victim. Defense counsel was permitted to bring out that the victim had a conviction for carrying a concealed weapon, *and* the fact he had been incarcerated for that conviction, despite the fact that carrying a concealed weapon is not an offense of violence.[34] Officer Brooks did not ask Gary to bring in his firearm for testing in that Gary had not mentioned his firearm in his statement; had he done so, said officer Brooks, that weapon might have been tested.[35] There was, however, no evidence that multiple guns had been fired, and no shell casings were found. The prosecutor asked Brooks "*In this case would you have enjoyed talking to the defendant*?" and Brooks answered "Yes," after which defense counsel

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[32] T 7-26, 72-76.

[33] "Under sub paragraph E [referring to the court rule] it indicates any criminal record that the party has in it's possession concerning *witnesses who it has disclosed* or who that party's opponent has disclosed, period. So that means then that the criminal record of any witness, okay. And of course the complaining witness is in fact a witness even though he's deceased," T 7-26, 77-78. Inexplicably, the court also denigrated the Oakland County Prosecutor's Office, saying "Maybe you're trying to play things like the Oakland County Prosecuting Attorney does." T 7-26, 81.

[34] T 7-26, 105.

[35] T 7-26, 91-96, 104-105.

objected.[36] A lengthy discussion then ensued, the trial judge taking the view that the question violated defendant's Fifth Amendment right to remain silent.

The prosecutor argued strenuously that the question was a proper response to the defense claim that there was a second gun involved, Anthony Gary's, which had not been turned over to the police and tested, and that if so tested it might show it had been fired.

> MR. KAPLAN: There's a second gun introduced in the equation by the defense, and they will argue and they have implied, in fact, they've expressively stated that the second gun was fired, and therefore it becomes a proper avenue for me to respond to.
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> THE COURT: I don't know as to whether or not there was comment either in opening statements or otherwise that the second gun was fired, none.
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> MR. KAPLAN: But there was, though, on cross-examination of Detective Brooks. Did you know about the second gun? Would you have tested the second gun to see if it had been fired? That's what --
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> *****
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> MR. KAPLAN: Right. But the defense is not accepting that proposition. The theory of the defense is that second gun was fired and that there was a cover up of some kind where Gary then collects the shells. . . .
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> *****
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> MR. KAPLAN: [responding to the defense motion for mistrial and dismissal] . . . The fact is, he's wrong about the law. And I . . . . People versus Collier and Jenkins versus Anderson both say, and I'll read it, that his peachment(sic) of defendant's testimony with pre-arrest silence is constitutional. It's permissible as a matter of law where under the circumstances it would have been natural for a defendant to come forward. . . . *He doesn't have a Fifth Amendment right until he's arrested*, but beyond that, his cross-examination of Detective Brooks placed the issue, put it in play, as sports announcers like to say, because the direct line on cross-examination was, wasn't there a second gun, would you have examined that second gun, would you have wanted to know that the second gun was fired? . . . So, if he's attacking her for not questioning Anthony Gary and Omar Madison about this gun, then the fact is, the

[36] T 7-26, 109.

> defendant has some play in this too because he's the one who's claiming self-defense, he's the one who has information about the gun if a gun was fired.[37]

The trial judge granted the motion for mistrial:

> Now I understand that self-defense has been raised by the defendant but he still has that constitutional right to remain silent throughout the entirety of this case.. . . I find it remarkable that you would go into this line of inquiry with the experience that you've had. . . . [the question and answer] did in fact call into question his Fifth Amendment right to remain silent. The Court is going to grant the motion for mistrial. Not going to, does grant the motion for mistrial.[38]

The trial judge did not find that the prosecutor had goaded the defense into requesting a mistrial to gain a tactical advantage.

> Sometimes when we wind up getting involved in the give and take of a trial, the heat of combat overwhelms our rational decision making processes, and I think that may very well have been the situation today. I don't believe that the last question that was posed to Detective Brooks was directly intended to impeach the credibility of the defendant. . . . or was consciously thought of by the prosecution as calling into question the defendant's right to remain silent guaranteed to him under the Fifth Amendment to the Constitution. So, I'm not going to dismiss this case with prejudice. But the motion for mistrial being is hereby granted. . . . I'm giving him the benefit of the doubt.[39]

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[37] T 7-26, 118 (emphasis supplied). The transcript of the opening statements of the first trial have not been provided by defendant, but there is no reason to believe the defense theory changed from the first trial to the second, and at the second trial counsel told the jury in opening statement that Thomas, the deceased, had fired first at defendant, who returned fire, and defendant so testified. T 11-19, 202; T 11-21, 652-655.

[38] T 7-26, 121-123.

[39] T 7-26, 109-124. Though the People had not finished their proofs, and though given the testimony of two witnesses that the defendant had shot the deceased, and though on a directed-verdict motion the trial court must take the evidence in the light most favorable to the People, the judge remarked that "had the defendant motioned for a Directed Verdict of acquittal following the People's proofs concerning count one, you know what my decision would

Discussion

A. This case is governed by *Salinas v Texas*: reference to a failure to come forward does not implicate the Fifth Amendment

1. *Salinas v Texas*

During an investigation of the murder of two brothers in 1992, officers visited Salinas, who had been a guest at a party given by the victims the night before they were killed. Shotgun shell casings had been recovered at the scene of the murders. Salinas agreed to hand over his shotgun for testing, and also to an interview by the police at the police station. Defendant was not in custody, and, for that reason, was not given Miranda warnings. He answered questions posed to him, but when asked whether his shotgun "would match the shells recovered at the scene of the murder," he did not answer, but instead "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up."[40] The police resumed questioning after a few minutes of silence, and Salinas continued to answer questions.

Salinas was then arrested on outstanding traffic warrants, but later released. After obtaining additional evidence, the police sought to arrest Salinas, but he was not found until 2007, living under an assumed name. He did not testify at trial, but "[o]ver his objection, prosecutors used his reaction to the officer's question during the 1993 interview as evidence of his guilt."[41]

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have been, it would have been granted," the judge adding in a gratuitous insult to the prosecuting attorney, saying "I'd like to see you try a case in Civil Court with an experienced trial lawyer, Mr. Kaplan, you'd have your fanny handed to you in a basket."

[40] *Salinas v. Texas*, 133 S.Ct. at 2178.

[41] *Salinas v. Texas*, 133 S.Ct. at 2178-2179.

Salinas, then, in a noncustodial setting, remained silent as to a question asked by the police, and that silence during the noncustodial interview to the particular question asked, as well as his demeanor at that time, were admitted *as proof of guilt in the case-in-chief.* The United States Supreme Court found that the Fifth Amendment was not implicated. The plurality opinion by Justice Alito, for himself and the Chief Justice and Justice Kennedy, said that it is established that "a defendant normally does not invoke the privilege by remaining silent." In other words, the Fifth Amendment is not self-executing; rather, "we have long held that a witness who 'desires the protection of the privilege . . . must claim it' at the time he relies on it." There are two exceptions to this principle, said the plurality, neither of which existed in the circumstances before the Court. First, "a criminal defendant need not take the stand and assert the privilege at his own trial. That exception reflects the fact that a criminal defendant has an 'absolute right not to testify.'"[42] Second, "a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary."[43] That principle which unites the cases within these exceptions is that "a witness need not expressly invoke the privilege where some form of official compulsion denies him 'a 'free choice to admit, to deny, or to refuse to answer.'"[44]

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[42] See *Griffin v. California*, 380 U.S. 609, 613–615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

[43] This includes the situation where "threats to withdraw a governmental benefit such as public employment sometimes make exercise of the privilege so costly that it need not be affirmatively asserted." See e.g. *Garrity v. New Jersey*, 385 U.S. 493, 497, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).

[44] *Salinas v. Texas*, 133 S.Ct. at 2179 -2180.

But Salinas's interview with the police was wholly voluntary, and he was free to leave at any time. He was not in any way during the interview "deprived of the ability to voluntarily invoke the Fifth Amendment. . . . it would have been a simple matter for him to say that he was not answering the officer's question on Fifth Amendment grounds. *Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment*."[45] The plurality declined to create a third exception to the invocation requirement "where a witness is silent in the face of official suspicion," as the Court has in the past "repeatedly held that the express invocation requirement applies even when an official has reason to suspect that the answer to his question would incriminate the witness."[46] Moreover, the plurality continued, to create such an exception would be "very difficult to reconcile with *Berghuis v. Thompkins*"[47] where the Court had held in the post-Miranda warning context that the right to silence must be unequivocally claimed.[48] In short, then, before Salinas "could rely on the privilege against self-incrimination, he was required to invoke it. Because he failed to do so," the admission of his silence as evidence of guilt did not implicate the Fifth Amendment.[49]

The three-justice plurality was joined as to result by Justices Thomas and Scalia. In their opinion, even if Salinas *had* unequivocally invoked the Fifth Amendment, his claim would still fail, because "the prosecutor's comments regarding his precustodial silence did not compel him to

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[45] *Salinas v. Texas*, 133 S.Ct. at 2180.

[46] *Salinas v. Texas*, 133 S.Ct. at 2181.

[47] *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010).

[48] *Salinas v. Texas*, 133 S.Ct. at 2181-2182.

[49] *Salinas v. Texas*, 133 S.Ct. at 2184.

give self-incriminating testimony." *Griffin v California*,[50] wrote Justice Thomas, "lacks foundation in the Constitution's text, history, or logic and should not be extended. . . . Given *Griffin*'s indefensible foundation, I would not extend it to a defendant's silence during a precustodial interview. I agree with the plurality that Salinas' Fifth Amendment claim fails and, therefore, concur in the judgment."[51]

Because when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,'"[52] it remains unsettled whether a comment on precustodial silence that results from a claim of the Fifth Amendment actually implicates the Fifth Amendment, but when no Fifth Amendment claim is unequivocally made, use of silence—and demeanor—during noncustodial questioning raises no Fifth Amendment issue.

2. The response to *Salinas*; *Abby v. Howe*[53] et al

Courts are now recognizing that *Salinas* "held that prosecutors may use a defendant's pre-arrest silence as substantive evidence of his guilt if the defendant did not expressly invoke his right to remain silent": [54]

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[50] *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

[51] *Salinas v. Texas*, 133 S.Ct. at 2184 -2185.

[52] *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977).

[53] *Abby v. Howe*, 742 F.3d 221 (CA 6, 2014).

[54] *Abby v. Howe*, 742 F.3d at 228.

- Several years before Abby's 2005 trial, this Court held that the use of a defendant's pre-arrest silence as substantive evidence of his guilt violated the Fifth Amendment's privilege against self-incrimination, and that counsel's failure to object to the unconstitutional use of such evidence "clearly fell below an objective standard of reasonableness." *Combs v. Coyle* . . . . [But] Abby cannot demonstrate that Gust's failure to object prejudiced him. During the pendency of this appeal, the Supreme Court held that prosecutors *may use a defendant's pre-arrest silence as substantive evidence of his guilt if the defendant did not expressly invoke his right to remain silent*. *Salinas v. Texas* . . . . The record in this case contains no evidence that Abby invoked his right to remain silent, which means that the prosecutor's comments regarding Abby's pre-arrest silence would be permissible under *Salinas* if Abby were tried today. . . . we now know that such an objection would be futile in light of *Salinas*.[55]

- After the state courts adjudicated this claim against Petitioner, the United States Supreme Court held that prosecutors may use a defendant's pre-arrest silence as substantive evidence of his guilt if the defendant did not expressly invoke his right to remain silent. *Salinas v. Texas* . . . . [56]

- Recently the Supreme Court affirmed the use of a defendant's silence. . . . The record in this case contains no evidence that the petitioner invoked his right to remain silent, which means that the prosecutor's comments regarding his pre-arrest statements are admissible. The defendant did not assert his right against self-incrimination, nor could his silence be perceived as an assertion of the right, and therefore the testimony regarding his silence was admissible.[57]

- The Supreme Court recently held that prosecutors may use a defendant's pre-arrest silence as substantive evidence of his guilt if the defendant did not expressly invoke his right to remain silent. See *Salinas v. Texas*. . . . In this matter Petitioner evaded police knowing that he was a suspect in the death of S.C. . . . . The prosecutor's comments to this effect were not a violation of Petitioner's right to be free of self-incrimination or due process and the state court did not err in so holding.[58]

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[55] *Abby v. Howe*, 742 F.3d at 228 (emphasis supplied).

[56] *Conklin v. Warren*, __F.Supp.3d__, 2014 WL 584901, 16 (E.D.Mich., 2014).

[57] *Jaynes v. Mitchell*, __F.Supp.3d__, 2015 WL 881245, 30 (D.Mass., 2015).

[58] *Young v. Ryan*, 2015 WL 1806035, 18 (D.Ariz., 2015).

- . . . the Court notes that the Supreme Court recently held, in *Salinas v. Texas* . . . that the use of pre-arrest silence as direct evidence of guilt is *not* a violation of a Defendant's Fifth Amendment rights.[59]

- In *Salinas v. Texas* . . . the United States Supreme Court upheld a conviction in which the defendant's prearrest silence was introduced in the government's case-in-chief as evidence of consciousness of guilt because the defendant had not explicitly invoked his rights under the Fifth Amendment to the United States Constitution.[60]

- In *Salinas v. Texas* . . . the Court concluded that a prosecutor's comments at trial about a defendant's silence in response to a precustodial police interview did not violate the defendant's Fifth Amendment privilege against self-incrimination. . . .We conclude that the silence to which the prosecutor referred was before the Petitioner's arrest and did not have the protections of the Fifth Amendment.[61]

- In *Salinas v. Texas* . . . . the plurality reasoned that the evidence of silence could be admitted as evidence of guilt because Salinas did not explicitly invoke his privilege against self-incrimination when he ceased answering questions posed by police.[62]

- In *Salinas*, a three-member plurality of the Supreme Court held that if an individual voluntarily submits to an interview by police and reaches a point at which he or she chooses not to speak based on Fifth Amendment rights, he or she must affirmatively invoke those rights. Otherwise, the State may offer and the jury may consider the fact that a defendant failed or refused to speak to law enforcement in circumstances where an innocent person would reasonably be expected to speak. As explained by the Court, "[P]opular misconceptions notwithstanding, the Fifth Amendment guarantees that no one may be 'compelled in any criminal case to be a

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[59] *Pearson v. Romanowski,* __F.Supp.3d__, 2013 WL 6801162, 6 (E.D.Mich., 2013) (emphasis in original).

[60] *Irwin v. Commonwealth*, 992 N.E.2d 275, 288 (Mass., 2013).

[61] *Heitz v. State*, 2013 WL 4779760, 7 (Tenn.Crim.App., 2013).

[62] *State v. Lovejoy,* 89 A.3d 1066, 1073 (Me., 2014.)

witness against himself'; it does not establish an unqualified 'right to remain silent.'"[63]

- Even assuming the privilege against self-incrimination protects against evidentiary use of postarrest silence in this context, the high court has "long acknowledged" . . . that the privilege "is not self-executing" and "may not be relied upon unless it is invoked in a timely fashion" . . . . We conclude that defendant had the burden to establish that he clearly invoked the privilege here.[64]

- In *Salinas v. Texas* . . . the U.S. Supreme Court held that a defendant's pre-arrest, pre- Miranda silence was not protected by the Fifth Amendment because the defendant had not asserted his privilege against self-incrimination.[65]

- In *Salinas v. Texas* . . . a plurality of the United States Supreme Court ruled that where a defendant does not expressly invoke the privilege against self-incrimination, the Fifth Amendment does not prohibit the prosecution from commenting on the defendant's pre-arrest, pre- Miranda silence.[66]

- . . . impeachment cases must be distinguished from *Salinas v. Texas*, having to do with whether the defendant's silence, in response to police questioning at a time when he had not been placed in custody and had not been given the Miranda warnings, is admissible in the prosecutor's case-in-chief as evidence of defendant's guilt. . . . The three-Justice plurality concluded that defendant's Fifth Amendment claim failed because he did not expressly invoke the privilege in response to the police questioning.[67]

Salinas is well-understood, then, as establishing that use of pre-arrest silence as direct evidence of guilt is *not* a violation of a Defendant's Fifth Amendment rights. If prearrest silence in the

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[63] *State v. Terry*, 328 P.3d 932, 936 (Wash.App. Div. 3, 2014).

[64] *People v. Tom*, 331 P.3d 303, 312 (Cal., 2014).

[65] *Cameron v. State*, 22 N.E.3d 588, 592 (Ind.App., 2014).

[66] *Horwitz v. State*, __So.3d__, 2015 WL 671136, 3 (Fla.App. 4 Dist., 2015).

[67] 3 LaFave, Israel, King & Kerr, *Criminal Procedure*, 9.6(a) (3rd ed.).

face of police questioning does not violate the Fifth Amendment, at least not in the absence of an unequivocal assertion of the right, then prearrest silence "out there in the world," as by leaving the scene of a homicide shooting and failing ever to contact the authorities with a version of the events, cannot possibly implicate the Fifth Amendment, there being no assertion of the right.[68]

B. Michigan was ahead of the curve: ***People v Cetlinski***,[69] ***People v McReavy***[70] et al

1. *People v Collier*[71]

The saga begins with *Collier*. Briefly put, defendant was charged with assault with intent to murder, and testified that in fact he was the victim of an armed robbery, and had stabbed one of his attackers in self defense. The prosecutor asked him on cross-examination why he did not stay and wait for the police, or report this crime to them. Reversing the Court of Appeals, this Court held that the Fifth Amendment was not violated because "here the 'silence' alluded to by

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[68] And as will be discussed, the best explanation of the Fifth Amendment in the context of prearrest silence in the absence of any confrontation by the police, as in *Salinas*, is contained in Justice Stevens' concurring opinion in *Jenkins v. Anderson,* 447 U.S. 231, 241-244, 100 S.Ct. 2124, 2131 - 2132, 65 L. Ed. 2d 86 (1980): " I would reject his Fifth Amendment claim because the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak. . . . The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police. We need not hold that every citizen has a duty to report every infraction of law that he witnesses in order to justify the drawing of a reasonable inference from silence in a situation in which the ordinary citizen would normally speak out. *When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment*. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent" (emphasis supplied).

[69] *People v Cetlinski*, 435 Mich 752 (1990).

[70] *People v McReavy*, 436 Mich. 197 (1990).

[71] *People v Collier*, 426 Mich. 23 (1986).

the prosecutor occurred before any contact with the police. . . . the prosecutor impeached defendant regarding his failure to report a robbery to the police. There was no questioning or mention of defendant's silence at or after his contact with the police."[72] Justice Boyle concurred, citing Justice Stevens's concurring opinion in *Jenkins v Anderson*, saying that "both the Fifth Amendment and Const. 1963, art. 1, § 17 guarantee a right to be free of governmentally compelled self-incrimination. In this case, there is simply no governmental action which induced defendant's silence before arrest. There is thus no basis 'as a matter of state constitutional law . . . to preclude use of a defendant's prearrest silence for impeachment purposes."[73]

And so, then, this Court in *Collier* found that the Fifth Amendment is not implicated when the defendant is cross-examined regarding silence "out there in the world"; that is, prearrest silence in the absence of any government official. If the Fifth Amendment is not involved, then the *use* to which the evidence is put—the failure to come forward—be it in the case-in-chief or for impeachment, can raise no constitutional issue.

2. *People v Cetlinski*

Salinas was further anticipated in *People v Cetlinski*. Defendant was charged with the arson of a bar he owned and managed. A waitress testified that she and defendant had discussed burning the bar, and how to do it. Defendant testified that burning the bar was the waitress's idea, that the discussions were a joke, and that he later repeatedly told the waitress he did not want the bar burned. This testimony suggested that the waitress, one of four people with keys to the bar, and who was present at the time of the fire, may have herself burned the bar. Defendant

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[72] *People v. Collier*, 426 Mich. at 31.

[73] *People v. Collier*, 426 Mich. at 40 (Boyle, J., concurring).

was asked on cross-examination why he had not told the police about these conversations with the waitress in his conversations with them; in other words, why, when he voluntarily spoke to the police in a non-custodial setting, he had omitted information that he was now giving testimony to on the stand. This Court held that "the use for impeachment purposes of a defendant's prior statement, including omissions, given during contact with the police, prior to arrest or accusation, does not violate the defendant's constitutional rights as guaranteed under the Fifth and Fourteenth Amendments or the Michigan Constitution,"[74] rejecting any limitation on the impeachment use of this silence to the situation involved in *Collier*; that is, silence involving no contact with the police. Justice Boyle wrote for the Court that the "use of a defendant's silence during contact with the police that does not occur 'at the time of arrest in the face of accusation,' . . . for impeachment purposes does not violate the Fifth Amendment or the Michigan Constitution."[75]

3. *People v McReavy*

Justice Boyle wrote again for the Court in *McReavy*, which anticipates *Salinas*, and goes perhaps a step beyond. Unlike *Salinas*, the questioning of McReavy was custodial. Defendant was thus given Miranda warnings, and waived his rights. An officer testified to defendant's demeanor during the questioning, saying that during the interview the defendant "appeared very dejected, sat with his head in his hands, and told police that everything was going fine until 'this

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[74] *People v. Cetlinski,* 435 Mich. 742, 746-747 (1990). And this Court has held on a number of occasions that the Michigan Constitutional protection in Article 1, § 17 of the 1963 Michigan Constitution is identical to the Fifth Amendment protection. See *People v. Tanner*, 496 Mich. 199, 239 (2014).

[75] *People v. Cetlinski*, 435 Mich. at 760.

happened.'" The officer testified that the defendant "did not respond to direct questions regarding the robbery or deny his involvement, but simply put his head in his hands and looked down, that he didn't respond yes or no to those questions." When "asked whether it was safe to assume the landlord had nothing to do with the robbery, the defendant answered, 'yes, he's a real nice guy," and when "asked whether he was saying he didn't pull the robbery the defendant stated, 'no.'" Defendant said that he did not want to answer any more questions, and told the officers to "contact him in the morning and he 'would clear up everything.' When asked whether he meant clear up the robbery, the defendant said, 'yes'."[76]

Justice Boyle for the Court said that the case was one "of a defendant who did not respond to some questions while responding to others during the period of time in which the trial court found that the state had carried the heavy burden of proving that defendant had waived [and thus had not asserted] his rights."[77] The Court concluded that where a defendant voluntarily waives his Fifth Amendment right to be silent, makes some statements, and then fails to respond to other questions, "the focus of the inquiry is whether the defendant is now manifesting either a total or selective revocation of his earlier waiver of Fifth Amendment rights and whether that revocation is induced by the implicit assurances contained in the Miranda warnings. . . . While we have no occasion here to state what conduct short of a formal exercise of the Fifth Amendment right to remain silent or a request for counsel would constitute an invocation, wherever that line is eventually to be drawn, it is not on the facts of this case."[78] In short, the

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[76] *People v. McReavy,* 436 Mich. at 205-206.

[77] *People v. McReavy,* 436 Mich. at 212.

[78] *People v. McReavy,* 436 Mich. at 218-219.

"Fifth Amendment does not preclude substantive use of testimony concerning a defendant's behavior and demeanor during a custodial interrogation after a valid waiver of his Fifth Amendment right against compelled self-incrimination. When a defendant speaks after receiving Miranda warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of the right to remain silent."[79]

And so, where in *Salinas* silence and demeanor during a noncustodial interview were held admissible as substantive evidence absent an assertion of the Fifth Amendment, in *McReavy* silence and demeanor during a custodial interview were held admissible as *substantive evidence* absent an assertion of the Fifth Amendment. Without an assertion of the Fifth Amendment in the face of governmental inquiry, the protection is not implicated, and one does not assert the Fifth Amendment simply by being "out in the world," failing to report to the police the later claimed exculpatory version of events in a homicide.

4. *People v Schollaert*[80]

The application of the principles of *McReavy* in *Schollaert* is instructive. There officers went to defendant's residence at 4 a.m. to question him about a murder, and testimony was admitted that defendant did not initially ask them why they were there, and the prosecutor argued the point to the jury. Defendant claimed that the prosecutor used his silence as substantive evidence, and that this violated the Fifth Amendment. The court observed that the case involved "an issue not directly addressed by our Supreme Court in *Sutton*, *Cetlinski*, or *McReavy*. *The question presented here is whether the admission as substantive evidence of testimony*

[79] *People v. McReavy*, 436 Mich. at 221-222.

[80] *People v Schollaert*, 194 Mich App 158 (1992).

concerning a defendant's silence before custodial interrogation and before the Miranda warnings have been given is a violation of the defendant's constitutional rights."[81] Drawing from the principles enunciated in these cases, the court concluded:

> In the present case, defendant's silence or non-responsive conduct did not occur during a custodial interrogation situation, nor was it in reliance on the *Miranda* warnings. Therefore, we believe that defendant's silence, like the "silence" of the defendant in *McReavy,* was not a constitutionally protected silence. On the basis of our reading of the Michigan Constitution, together with developments in Fifth and Fourteenth Amendment jurisprudence, we conclude that defendant's constitutional rights were not violated when evidence of his silence was admitted as substantive evidence.[82]

C. Conclusion

The People will not belabor the split of circuits noted in the answer to the application, as *Salinas* has intervened. That case holds that prosecutors may use a defendant's pre-arrest silence as substantive evidence of guilt if the defendant did not expressly invoke the right to remain silent, which is consistent with Michigan law; if that silence is admissible substantively, then its admission as impeachment, if relevant for that purpose, would also raise no constitutional issue, as the use to which the evidence is put makes no difference.[83] The prosecutor here did not violate any right of the defendant, and so the People answer the Court's first two questions:

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[81] People v. Schollaert, 194 Mich.App. at 164 (emphasis supplied).

[82] *People v Schollaert*, 194 Mich.App. at 166-167

[83] See *Hall v. Vasbinder*, 563 F.3d 222, 233 -234 (CA 6, 2009): "a prosecutor can refer to a defendant's silence if doing so would be a fair reply to a defense theory or argument . . . . The testimony about Hall's silence was not elicited by the prosecutor for an improper purpose, but rather in reply to the defense theory that Hall was the subject of governmental persecution throughout the investigation." Here, the theory was that Gary's gun was fired and defendant acted in self-defense, that Gary retrieved the gun to avoid its being tested, and also recovered any casings.

1. under the United States Supreme Court decision in *Salinas v. Texas*—and precedent from this Court—the prosecution is permitted—that is, the Constitution so permits—during its case-in-chief, to elicit testimony from a police witness regarding the defendant's pre-arrest silence or failure to come forward to explain a claim of self-defense; the Sixth Circuit has recognized that *Combs v Coyle*[84] has been abrogated by *Salinas*, see *Abby v. Howe*;

2. that silence is admissible as substantive evidence—that is, the Constitution so permits—of the defendant's guilt, *and* as impeachment of the defendant's anticipated defense theory.

D. The court's third question: if prearrest silence or failure to come forward is constitutionally inadmissible, there is no basis on which to find that the trial court clearly erred in finding that the trial prosecutor did not intentionally goad the defense into moving for a mistrial, so as to allow the defendant to be retried, defendant having consented to the mistrial by moving for it

Given those cases extant at the time of the prosecutor's question, which referenced defendant's departure from the scene of the homicide, not to be seen for four months, and the implied theory of self-defense, and of manipulation of evidence by Gary, it is hard to see how the prosecutor's question to the investigating detective—"*In this case would you have enjoyed talking to the defendant*?"—can be viewed as to have been asked in bad faith, with a belief that the question and answer ["yes"] were improper. And the prosecutor argued vigorously to the trial judge that the question *was* proper, citing *Collier* and *Jenkins*, and arguing that "He [the defendant] doesn't have a Fifth Amendment right until he's arrested."[85] This argument is consistent with those cases, and with *McReavy*'s holding that even *after* arrest silence during interrogation that cannot be attributed to an assertion of the Fifth Amendment is admissible as evidence of guilt, and certainly with *Schollaert*. And now *Salinas* has confirmed that substantive

[84] *Combs v Coyle*, 205 F3d 269 (CA 6, 2000).

[85] See B., supra.

use of silence before the invocation of the Fifth Amendment is constitutionally permissible. Because no error occurred, the prosecutor's question cannot be said to have provoked the mistrial, which defendant requested, thereby consenting to a retrial. If the question is determined to have been improper, then at most the prosecutor made a mistake, and certainly, not on the law as it existed, and exists now with *Salinas*, a self-evident one. Because the prosecutor's question was proper, he plainly was not seeking a mistrial; one cannot goad the defense to request a mistrial by asking a proper question.[86] And the trial judge found that the prosecutor had no such purpose. Double jeopardy did not bar the retrial here.[87]

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Salinas, as well as *McReavy*, control here. But the People submit that the approach to the question here taken by Justice Stevens in *Jenkins*, Justices Thomas and Scalia in *Salinas*, and by Justice Boyle in *Collier*, is correct.

A. First Principles: The Fifth Amendment in History

It is generally wise to begin consideration of the meaning of a constitutional text by reviewing the actual language of the constitutional provision at issue, for reference only to the judicial gloss which has been given the relevant language can lead one far astray. As has been noted in a different context,

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[86] And the People would note that at the retrial, the prosecutor argued defendant's failure to come forward after the shooting before the very same judge, and with the same defense counsel, and with no objection from the defense or insult from the trial judge.

[87] The People would note that defendant's arguments regarding the prosecutor's case "going south," and so the prosecutor wished for a mistrial, are rebutted by the fact that the question was proper; further, they are largely puffery, for on virtually the same evidence—though with the prosecutor allowed to finish his proofs—the defendant was convicted at the second trial of second-degree murder, assault with intent to murder, and felony firearm.

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.[88]

The People thus begin with the relevant text.

> No person . . . shall be compelled in any criminal case to be a witness against himself, ...

A discussion of the permissibility of testimony regarding silence of the defendant, whether before arrest, after arrest, or during trial, as against the protection of the Fifth Amendment against *compelling* one to be a "witness against himself," seems odd when one takes account of history. Though it seems almost astounding today, at the time of the Founding, and of the ratification of the Bill of Rights, *no* state even *permitted*, much less compelled, an accused in a criminal case to testify. It was not until *1864* that Maine became the *first* state to *permit* criminal defendants to testify, and Congress followed suit in 1878.[89] But it is not the case that criminal defendants were actually silent at their trials, they simply were not competent as sworn witnesses. Instead, the defendant was permitted—and expected—to give an unsworn statement at trial on his own behalf, and was also expected to *give a statement pretrial*. The failure to make a statement to the justice of the peace *would be reported to the jury*.[90] As Sir James Stephen noted,

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[88] *United States v. 12 200-Foot Reels of Super 8mm. Film,* 413 US 123, 127, 93 S.Ct. 2665, 668, 37 L Ed 2d 500 (1973).

[89] See Ralph Rossum, "'Self-Incrimination': The Original Intent," in Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding* (University of Virginia Press: 1991), p.276.

[90] Langbein, "The Privilege and Common Law Criminal Procedure," in *The Privilege Against Self-Incrimination*, quoted by Justice Scalia, dissenting, in *Mitchell v United States*, 526

evidence given against the defendant operated as "so much indirect questioning," and if the defendant "omitted to answer the questions it suggested he was very likely to be convicted."[91] If, then, a defendant was not permitted to be a witness at trial, but was expected to make unsworn statements, the failure to do so to be held against him, why, then, the inclusion in the Fifth Amendment of a protection against compelled self-incrimination in criminal cases?

Some scholars, Leonard Levy principal among them, take the view that the Founders, and the members of state constitutional conventions which enacted similar protections on which the Fifth Amendment was based, "failed to say what they meant," for if they meant what they said, then the common-law prohibition on testimony from the accused in criminal cases rendered the Fifth Amendment superfluous.[92] Instead, concluded Levy, what those individuals drafting state Bill of Rights and the Fifth Amendment actually *meant* to do was adopt the common-law right of *nemo tenetur seipsum acusare* (no one is bound to accuse himself), which protected not only against courts in criminal cases but against all of government, in all kinds of actions, protecting witnesses as well as the accused, and protecting against "threats of criminal liability, civil exposure, and public obloquy."[93] This redrafting of the Fifth Amendment is not tenable.

Professor Rossum nicely notes that Levy and his followers fail to take account of the very real probability—given the express language of the Fifth Amendment—that the drafters were not writing to "end some current abuse but simply to provide a floor of constitutional protection

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US 314, 119 S Ct 1307, 143 L Ed 2d 424 (1999).

[91] J. Stephen, 1 *History of the Criminal Law of England* 440 (1883).

[92] See Levy, *The Origins of the Fifth Amendment (2d Ed)* (MacMillan: 1986).

[93] See Rossum, at 276.

above which the common law was free to operate but below which it could not go."[94] Though it seems quaint now, during the 17th century the very giving of an *oath* was held itself to be a coercive act, and the ecclesiastical Court of High Commission engaged in the practice of summoning those with nonconformist opinions and requiring them to take an oath and answer questions. Refusing the oath resulted in contempt and Star Chamber proceedings; lying under oath was perjury; telling the truth under oath could subject one to prosecution for political and religious crimes. The celebrated trial of John Lilburne, a Puritan agitator who refused to take the oath, led to the prohibition of the administration of any oath obliging a person "to confess or accuse himself or herself of any crime."[95] Professor Albert Alschuler concludes that the history of the Fifth Amendment is "almost entirely a story of when and for what purposes people would be required to speak under oath."[96]

Requiring an oath of the criminally accused was *coercive*, and banned for that reason, as being equivalent to torture and the rack. Manuals which instructed justices of the peace on the conduct of their office warned, from the late 16th century through the mid- 19th century, that "[t]he law of England is a Law of Mercy, and does not use the Rack or Torture to compel criminals to accuse themselves. . . . I take it to be for the Same Reason, that it does not call upon the Criminal to answer upon Oath. For, this might serve instead of the Rack, to the Consciences

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[94] Rossum, at 277.

[95] See Wigmore, "The Privilege Against Self-Incrimination: Its History," 15 Harv L Rev 610, 621-24 (1902).

[96] Alschuler, "A Peculiar Privilege in Historical Perspective: The Right to Remain Silent," 94 Mich L Rev 2625, 2638 (1994).

of Some Men, although they have been guilty of offenses."[97] To put the matter finely, then, the purpose of the Fifth Amendment, when understood in its historical context, was "to outlaw torture and improper methods of interrogation," including the compelling of testimony under oath.[98] Put another way, the purpose of the Fifth Amendment was to preclude the obtaining of statements or testimony from the accused in criminal cases by use of *coercive governmental conduct*.

B. Silence

> *. . . on any view the Fifth Amendment does not forbid the **taking** of statements from a suspect; it forbids **compelling** them. That is what the words say, and history and policy unite to show that is what they meant. Rather than being a 'right of silence,' the right, or better the privilege, is against being compelled to speak. The distinction is not mere semantics; it goes to the very core of the problem.*[99]
>
> *The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police. . . . When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment.*[100]

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[97] See Alschuler, at 2648.

[98] Alschuler, at 2631.

[99] H. Friendly, *Benchmarks*, p. 271 (1967) (emphasis in the original).

[100] *Jenkins v. Anderson*, 447 U.S. 231, 243-244, 100 S.Ct. 2124, 2132, 65 L.Ed.2d 86 (1980) (Stevens, J., concurring).

1. The unintelligibility of a "right to silence"

A large part of the analytical difficulty in considering the Fifth Amendment and admissibility of silence is the transmogrification of the right not to be compelled to be a witness against oneself into a "right to remain silent." The latter is not simply a shorthand expression for the former, as recognized by Judge Friendly, as it imports necessarily a waiver analysis foreign to the text and history of the Fifth Amendment. The *sine qua non* for involvement of the Fifth Amendment is coercive governmental conduct.[101] In the absence of coercive conduct by a governmental official, the fact that an individual speaks or does not speak, whether to some other "ordinary citizen" or even to a governmental official, has nothing to do with the Constitution. When one speaks voluntarily, he or she is not waiving his or her Fifth Amendment right not to be compelled to speak, the only right protected by the Fifth Amendment; rather, the speech is voluntary. If coerced, and by a governmental agent, the Fifth Amendment applies. But plainly no one, in speaking with a governmental agent, is saying, in effect: "Yes, I understand that I have a right not be compelled to speak, but I choose to waive that right, and wish to be compelled to speak, so you may now proceed to engage in some coercive activity in order to gain my verbal cooperation." Rather, if the consent to speak is not voluntary, then the individual has been compelled, and his or her statements are barred from admission at trial. But it is logically impossible to waive the right not to be compelled to speak, and this is what the Constitution protects, not any free floating "right to silence" without regard to coercive governmental

[101] *Colorado v Connelly*, 479 US 157, 107 S Ct 515, 93 L Ed 2d 473 (1986).

conduct. There is no right to silence which must be waived knowingly and intelligently, there is an unwaivable right not to be coerced.[102]

2. Evidentiary use of silence

Justice Stevens statement concurring in *Jenkins*[103] that "the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak" is both cogent and correct. The United States Court has never held that comment on silence before arrest,[104] after arrest but before Miranda warnings,[105] or after arrest and after Miranda warnings, violates the Fifth Amendment. The Court, rather, has held that only comment on silence after arrest and *after* Miranda warnings violates due process:

> while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.[106]

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[102] As Professor Grano has cogently put the matter, ". . .while the notion of waiving a right to silence is intelligible, the notion of waiving the a right not to be compelled, especially when compel is a synonym for coerce, is not . . . . If the Fifth Amendment really conferred a substantive or formal right of silence, the police, contrary to what even *Miranda* recognized, might have to stop and caution 'a person who enters a police station and states that he wishes to confess,' for the issue whether the right to silence was knowingly waived would be present in all such cases." Grano, *Confessions, Truth, and the Law*, at 142.

[103] *Jenkins v Anderson*, 447 US 231, 241, 100 S Ct 2124, 2131, 85 L Ed 2d 86 (1980)(Stevens, J., concurring).

[104] *Jenkins v Anderson*, supra.

[105] *Fletcher v Weir*, 455 US 603, 102 S Ct 1309, 71 L Ed 2d 490 (1982).

[106] *Doyle v Ohio,* 426 US 610, 618-619, 96 S Ct 2240,2245, 49 L Ed 2d 91 (1976). But see *Portuondo v Agard*, 529 US 61, 120 S Ct 1119, 146 L Ed 2d 47 (2000), where the Court, in upholding comment that petitioner testified after his witnesses giving him the opportunity to

But where an "implicit assurance" that silence will not be used in any ways is *not* given—that is, the comment is on silence even after arrest but before Miranda warnings—no constitutional issue arises.

In *Fletcher v Weir*[107] petitioner was cross-examined regarding why, *after arrest* but before Miranda warnings, he had not offered the exculpatory version of events that he had offered at trial, and in *Brecht v Abrahamson*[108] the Court observed that "the Constitution does not prohibit the use for impeachment purposes of a petitioner's silence prior to arrest. . . or after arrest if no Miranda warnings are given. . . . Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty."

The rule of *Doyle v Ohio*[109] is built on *Griffin v California*,[110] which bars comment on the defendant's decision not to testify on the basis that such comments violate the Fifth Amendment. This notion is, as indicated above, contrary to the text and history of the Amendment. To reiterate, pretrial procedure in colonial America was governed by the Marian Committal Statute, which provided:

> [S]uch Justices or Justice [of the peace] before whom any person shall be brought for Manslaughter or Felony, or for suspicion thereof, before he or they shall commit or send such Prisoner to Ward, shall take the examination of such Prisoner, and information

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tailor his testimony, said that "Although there might be reason to reconsider *Doyle*, we do not do so here."

[107] *Fletcher v. Weir*, 455 U.S. 603, 606–607; 102 S Ct 1309; 71 L.Ed.2d 490 (1982).

[108] *Brecht v Abrahamson*, 507 U.S. 619, 628, 113 S. C.t 1710, 123 L.Ed. 2d 353 (1993).

[109] *Doyle v Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed. 2d 91 (1976).

[110] *Griffin v California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

> of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the Felony shall put in writing, within two days after the said examination. . . .

The justice of the peace testified at trial as to the content of the defendant's statement; if the defendant refused to speak, *this would also have been reported to the jury.*[111] And Justices of the peace continued pretrial questioning of suspects, whose silence continued to be introduced against them at trial, after the ratification of the Fifth Amendment.[112]

Doyle's decision to ban reference to an accused's silence after receiving Miranda warnings was not without its dissenters. Justice Stevens objected that "there is nothing deceptive or prejudicial to the defendant in the Miranda warning. Nor do I believe that the fact that such advice was given to the defendant lessens the probative value of his silence, or makes the prosecutor's cross-examination about his silence any more unfair than if he had received no such warning."[113] And the majority in *Portuondo v Agard*, permitting comment on defendant's presence in the courtroom throughout all the testimony, observed that "Although there might be

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[111] Langbein, The Privilege and Common Law Criminal Procedure, in The Privilege Against Self-Incrimination 82, 92 (Helmholz et al. eds.1997).

[112] See See, *e.g.,* Fourth Report of the Commissioners on Practice and Pleadings in New York-Code of Criminal Procedure xxviii (1849); 1 Complete Works of Edward Livingston on Criminal Jurisprudence 356 (1873), referenced by Justice Scalia in *Mitchell.* See also Justice Scalia's further discussion of the illogic of the *Griffin* decision, concluding that *Griffin* was a "wrong turn" in constitutional jurisprudence, and Justice Thomas''s call for a "reexamination" of *Griffin* in his opinion in *Mitchell.*

[113] *Doyle*, at 426 U.S. 610, 621, 96 S.Ct. 2240, 2246 (Stevens, J., dissenting).

reason to reconsider Doyle, we need not do so here."[114] But *Griffin* and its progeny, including *Doyle*, stray far from text and history.

Because, then, the defendant here was under no official compulsion either to speak or to remain silent, evidence of and comment on his silence does not implicate the Fifth Amendment in any way.

[114] *Portuondo v. Agard,* 529 U.S. 61, 74, 120 S.Ct. 1119, 1128 (2000) (emphasis added).

Relief

Wherefore, the People respectfully request that the leave be denied, or the convictions affirmed.

Respectfully submitted,

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